United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

75-2102

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

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ELIJAH EPHRAIM JHIRAD,

Petitioner-Appellant,

- against -

DOCKET NO. 75-2102

THOMAS E. FERRANDINA,
United States Marshal,
Southern District of New York,

Respondent-Appellee.

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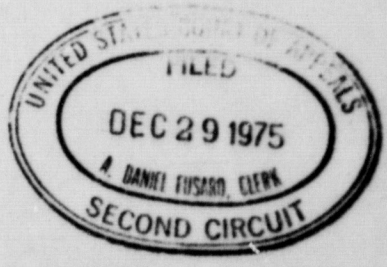
P/S

APPELLANT'S REPLY BRIEF



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PRELIMINARY STATEMENT

The central issues of this case are not technical, as the Government of India suggests. Rather, they concern fundamental questions of due process, fair hearing and the salutary purposes of statutes of limitation, concepts which have been eclipsed throughout much of the world, including India, if recent reports are to be believed.

The Government of India, in its brief, has refused to come to grips with the questions of fair play raised in this proceeding. Some of these questions are as follows:

1. Is it fair, once a case has been remanded for the trial of a particular issue to try a man on an entirely different issue?
2. Is it fair where an issue of fact has arisen under a treaty (and therefore under the highest law of the land) to deny a party rudimentary discovery procedures and to determine the issue on speculation rather than on evidence?
3. Is it unconscionable, where the statute of limitations is a key element of a case, for a court to delay its decision for fourteen months for no discernible reason?
4. Finally, given the fact that the extradition treaty places so much importance on the statute of limitations, is it reasonable to surrender Jhirad to the Government of India when that government waited fully seven years after the alleged commission of the last offense and two

years after Jhirad had departed India before bringing charges against him?

Instead of dealing forthrightly with these issues, the Government has attempted to tar Jhirad with a broad brush and has distorted both the evidence and the plain meaning of the decisions below.

POINT I

THE GOVERNMENT OF INDIA MISCONSTRUES THIS COURT'S MANDATE.

When this Court remanded this case to the District Court "to make findings on the issue of intent," (A 69) it did so on a holding that:

> "[T]he government must show an intent to flee from prosecution or arrest before the statute of limitations is tolled. As the court noted in Donnell [v. United States, 229 F.2d 560 (5th Cir. 1966], the phrase 'fleeing from justice' carries a common sense connotation that only those persons shall be denied the benefit of the statute of limitations who have absented themselves from the jurisdiction of the crime with the intent of escaping prosecution. It does not appear to us to be unreasonable to provide for tolling of the statute of limitations when a person leaves the place of his alleged offense to avoid prosecution or arrest and for not tolling the statute when a person without such purpose of escaping punishment merely moves openly to another place of residence." (A 68) (Emphasis added)

That analysis is the law of this case.

Thus, the mandate of the Court of Appeals was not a broad direction, as the Government of India implies, but a narrow one, to make findings on the issue of intent to determine whether the government had shown "an intent to flee from prosecution or arrest" that would toll the statute of limitations.

Although the magistrate found that Jhirad had "considered the possibility that he would not return to

India even before he left for Brussels." (A90) The magistrate firmly stated with respect to what the Donnell court would call Jhirad's "general intention...in leaving the jurisdiction" (229 F.2d at 565):

> "On all the evidence, I conclude that Jhirad left India for the primary and immediate purpose of attending a World Jewish Conference in Brussels." (A90)

Thus the magistrate resolved the issue of intent, as that phrase had been construed by this Court, in Jhirad's favor.

When, therefore, the magistrate held that "I find it more likely than not that, although he did not leave India to avoid prosecution, while away he decided not to return to India, since he feared being prosecuted," the magistrate formulated a new and inappropriate view of how the statute of limitations is tolled.

The District Court accepted the magistrate's revised version of the law of the case. (A100) It never said, as the Government of India implies, that the magistrate found that Jhirad had left India to avoid prosecution. Furthermore, the District Court determined only that the magistrate's conclusions were supported by the evidence. (A100)

POINT II

THE MAGISTRATE'S FINDING THAT JHIRAD DID NOT LEAVE INDIA TO AVOID PROSECUTION IS NOT CLEARLY ERRONEOUS

The Government of India, convinced that there is no evidence to support the magistrate's conclusion that Jhirad formed an intention to flee from justice while abroad and sometime in the "middle of September" (A93), retreats to the "evidence" to support a finding that Jhirad left India to avoid prosecution. Since the magistrate found that Jhirad "did not leave India to avoid prosecution", (A93) and since the District Court did not disturb that finding (A100), it is binding on this Court, unless it is "clearly erroneous". Federal Rules of Civil Procedure, Rule 52.

The record fully supports the conclusion below as to Jhirad's intent when he left India.*

Evidence on the issue of intent was offered by both sides at the original hearing before the magistrate. Additional evidence was offered at the second hearing on January 30, 1974. **

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*Jhirad did not include in his appendix any portion of the transcript relating to the circumstances of Jhirad's departure from India because of the magistrate's finding in his favor. The references that follow, therefore, are to the stenographer's minutes.

**"Original hearing" refers to the hearing before the magistrate held prior to the Court of Appeals decision.

The following facts are uncontroverted; and each of them have been independently established without regard to Jhirad's testimony:

1. Jhirad left India on July 26, 1966 in order to attend a World Jewish Congress meeting in Brussels, along with his wife and children, pursuant to written invitations previously extended to him and his family (Exhibits G, H, I, J, K and L). (SM, original hearing, pp. 134, 287).
2. No charges were brought against Jhirad until October 1968. (SM, original hearing, p. 172).
3. Under Indian law, the case which is the subject of this proceeding was registered on the 2nd day of July 1966 (SM, original hearing, p. 151); and an investigation was started only after the registration. (SM, original hearing, p. 151).
4. The police did not begin the investigation until July 5, 1966 (SM, original hearing, p. 149) and had not questioned Jhirad prior to his departure (SM, original hearing, p. 155).
5. On the eve of his departure, Jhirad sought and obtained permission from Naval Headquarters to leave India (Exhibit "E"; Exhibits 23 and 24). (SM, hearing of January 30, 1974, pp. 77-79).
6. On the eve of his departure, Jhirad applied for and obtained a new passport from the Government of India

(Exhibit "D"). (SM, original hearing, pp. 147-148)

7. In Brussels, Jhirad renewed an acquaintance with Lucian Gregory Weeramantry, presently Chief Project Administrator for the United Nations Institute for Training and Research and an advocate of the Supreme Court of Ceylon. (SM, original hearing, pp. 376-378)

8. From Brussels he went to Geneva where he against met with Mr. Weeramantry, who testified that Jhirad did not conceal himself in any way and that "He did appear in open society, and very much so. As a matter of fact, hehad been to my place for dinner on more than one occasion when I had Indian friends, including one occasion where we had a First Secretary or Second Secretary of the Indian Mission". (SM, original hearing, p. 380).

9. In Geneva, Jhirad addressed a meeting of the International Commission of Jurists, at which there was a representative of the Indian Mission. (SM, original hearing, p. 381).

The following facts are derived from the testimony of Jhirad (who was subject to cross-examination) and are uncontradicted by any of the evidence offered by the Government of India:

(a) After leaving the World Jewish Congress in

Brussels, Jhirad went to Geneva where he spent a year. (SM, original hearing, pp. 318-319).

(b) While in Geneva, he reached the decision that he would not return to India because of the political harassment to which he had been subjected, which had resulted in a decline in his wife's health. (SM, original hearing, pp. 319-320).

(c) His decision not to return to India was made late in 1966, in November or December. (SM, hearing of January 30, 1974, pp. 112, 113).

(d) While in Switzerland, he saw the Attorney General of India, Mr. Daphtary, on three or four occasions between September 1966 and July 1967.

(e) From Switzerland, Jhirad emigrated to Israel where he served as a government official until July 1971, when he emigrated to the United States. (SM, original hearing, pp. 322-324).

(f) Jhirad first learned that a warrant for his arrest had been issued on August 3, 1972 when he was arrested in the United States. (SM, original hearing, p. 371).

(g) Captain Mehta, the Chief of Personnel, who authorized Jhirad to leave the country, consulted with Admiral Nair prior to authorizing Jhirad's departure from India. This occurred in June 1966. (SM, January 30, 1974 hearing, pp. 77-79).

(h) When he departed, Jhirad left his personal possessions at home, including cash in the sum of $10,000.

It is nothing short of absurd to suggest that Jhirad fled India to avoid prosecution within the meaning of Title 18, U.S.C. §3290, when, on the eve of his departure, he sought permission to leave from the very employer who now accuses him of embezzling funds, and from the very Government which seeks to return him to India.

Furthermore, once he arrived abroad, Jhirad lived openly and publicly and met frequently with the officials of the Government of India. From these facts, it is impossible, as a matter of law, to make a finding that, when Jhirad left India in July 1966, he was fleeing from the justice of India. Indian justice made no charges against him until 1968; and Jhirad did not learn of them until 1972.

However, against this irrefutable mass of evidence, the Government of India has contrived a set of allegations by which it hopes to establish that, despite the magistrate's finding, Jhirad knew that an investigation had commenced and left India to avoid prosecution.

All of the evidence in this respect is hearsay. The witnesses were not subject to cross-examination. Nor was their testimony given in an adversary proceeding.

The evidence suffers from other deficiencies as well. The Government's "star witness" is one K. R. Nair, who in his

various statements has the dubious distinction of never saying the same thing twice. Compare Exhibits 105, 7 and 104 in evidence, and see SM, original hearing, pp. 184-185). (A197, A194)

The Government's second "witness" was M.S.I. Swamy, who, despite the comprehensive evidence offered by the Government of India on the initial hearing, surfaced for the first time at the remand hearing. The document containing the statement of Swamy (Exhibit 107) has a most curious and significant strikeover and correction. It refers to his first contact with this matter as occurring at a meeting in February 1966. Someone struck out the word "February" and replaced it with the word "May" 1966. The Government of India made no explanation for this change in the document. The change was made, obviously, to strengthen the Government's contention that Jhirad left India shortly thereafter, because Swamy then refers to a meeting he held with Jhirad following the "May" ("February") meeting. (A200)

Another new arrival was the witness Mathur, whose statement was taken before the Indian magistrate on January 16, 1974 (Exhibit 101). Mathur stated that he was a "sub-agent" of the Central Bank of India, Ashoka Hotel Branch, from 1962 to 1968. He states that "sometime in May, I received a notice" from the police to produce documents. He states later that the notice was "received by me" on May 26, 1966. He states that "After the receipt of the above-mentioned notice by me", he

had a conversation with Jhirad and told him about the notice. The deficiency is that the order to produce the documents was not directed to Mathur at all but was directed, rather, to the manager of the Branch at a time when Mathur was no more than a sub-agent. Yet in three places in his statement, Mathur insists that the notice was directed and delivered to him personally. Mr. Mathur, of course, was not available for cross-examination. Mr. Jhirad, who was available for cross-examination, denied that he had had any such conversation with Mathur (SM, January 30, 1974 hearing, p. 66). (A180)

The Magistrate's finding - that Jhirad did not leave India to avoid prosecution - is fully supported by evidence in the record.

POINT III

THE GOVERNMENT OF INDIA MISCONSTRUES THE IMPORT OF THE TREATY

The British-American Treaty of 1931 is more than a contract, it is the supreme law of the United States. Art. VI, United States Constitution; Missouri v. Holland, 252 U.S. 416, 40 S.Ct. 382, 64 L.Ed. 641 (1920).

It is meaningless to argue that '[t]he defense of the statute of limitations is not available in international extradition proceedings" (Gov't brief, p. 22) because here, the Treaty makes an expired statute of limitations an absolute bar to extradition. And the Treaty by its express terms makes the entire body of U.S. jurisprudence which relates to the statute of limitations issue applicable, including burden of proof.

The "traditional rules" (Gov't brief, p. 24) nowhere require that every issue in an international extradition hearing be determined according to the probable cause standard, as the Government of India argues. Indeed, another example of an issue which must be determined beyond a reasonable doubt is set forth in Article 9 of the Treaty:

> "The extradition shall take place only if the evidence be found sufficient, according to the laws of the High Contracting Party applied to...to prove that the prisoner is the identical person convicted by the courts of the High Contracting Party who makes the requisition...." (emphasis added) (A 108)

Certainly it would be insufficient (under Article 9) to show that there is merely probable cause to believe that the person held is the person to be extradited, yet this is an issue to be determined in an extradition proceeding.

Jhirad is not "engrafting" a standard of proof onto the Treaty. The Treaty "engrafts" the domestic standard on to an extradition hearing.

And it is not because Jhirad may lose his liberty that the criminal standard is appropriate. The domestic criminal standard is required by Article 5 of the Treaty.

While it may be true that if Jhirad is finally extradited issues of delay and laches will be considered by the Indian court, the issue of whether his extradition is improper because the U.S. statute of limitations has run will never be in issue again. The Treaty makes the statute of limitations a preliminary, jurisdictional question. Therefore, because the Treaty incorporates the domestic limitation period, Jhirad is entitled to the substantive domestic rules relating to that standard.

Jhirad's intent was required to be proven beyond a reasonable doubt.

POINT IV

THIS COURT MAY NOT CONSIDER WHETHER THE STATUTE OF LIMITATIONS IS A BAR TO JHIRAD'S EXTRADITION FOR ALL OF THE OFFENSES SET FORTH IN THE THREE SEPARATE CHARGE SHEETS FILED UNDER INDIAN CRIMINAL PROCEDURE

Without explanation, the Government of India argues that under Indian law, Jhirad may be prosecuted for every act alleged in the three charge sheets. This contention should be disregarded by this Court.

Early in these proceedings, the District Court held "that the last three offenses are extraditable. The court does not decide whether or not all of the alleged offenses might, in fact, constitute one extraditable offense as we find such a determination to be unnecessary." (A18)

This Court never disturbed the District Court's finding, (A65) and it was not left undecided by the remand. Thus, the Government's"Point V" improperly argues an issue not before this Court.

Also, the Government argues foreign law not in the record. Indian law is a fact which must be proven. Expert testimony, as well as other relevant documents and other material may be received in evidence. Banco National de Cuba v. Sabbatino, 27 FRD 255 (SDNY 1961). Here, the Government makes an untested assertion as to Indian law.

The Government's "Point V" should be disregarded.

CONCLUSION

The writ of habeas corpus should be granted by this Court.

Dated: December 29, 1975

Respectfully submitted,

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